No. 86-1642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
and WEST PENN POWER COMPANY,
Petitioners,

v.

JOHN O. MARSH, JR.,
LIEUTENANT GENERAL JOHN W. MORRIS,
COLONEL MAX R. JANAIRO, JR.,
and COLONEL JOSEPH A. YORE,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY MEMORANDUM OF PETITIONERS

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Does the Federal Energy Regulatory Commission have exclusive jurisdiction to determine, as required by Section 10(a) of the Federal Power Act, whether a hydroelectric project is "best adapted" to a "comprehensive plan" in the public interest, or are its decisions pursuant to this Congressional mandate to be subject to veto by other federal agencies such as the United States Corps of Engineers and the Environmental Protection Agency? This is the question to which petitioners seek an answer from this Court.

Two federal agencies, the Federal Energy Regulatory Commission ("FERC") and the United States Corps of Engineers, remain of opposite view on this question. FERC believes that it has exclusive jurisdiction under the Federal Power Act to decide whether a hydroelectric project is in the public interest and should be licensed. The Corps be-

lieves that it is entitled under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (the "FWPCA") to veto a FERC hydroelectric license and to impose its view of the public interest on FERC. The United States' brief in opposition filed on behalf of both FERC and the Corps attempts to patch over these diametrically opposite positions, in part by pointing to a 1981 memorandum of understanding between FERC and the Corps which ignores the alleged powers of a third federal agency, is by its terms useless if the agencies are not in agreement, and is at odds with the agencies' respective characterizations of their own roles.

Because the conflict in roles and powers of FERC on the one hand and the Corps and EPA on the other in licensing hydropower projects has not been resolved, uncertainty and litigation have resulted and neither of these important federal statutes is being implemented in the way Congress intended. Entirely duplicative administrative proceedings are conducted by FERC and the Corps regarding the very same subject matter, at times arriving at different results, and the statutory rights created by the Federal Power Act are being denied parties such as the petitioners in this case.

These issues require addressing by this Court.

I. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE THAT RESPONDENTS' BRIEFS CANNOT DISMISS

Notwithstanding the intragovernmental conflict on the merits[1], respondents argue that certiorari should nonethe-

[1] The United States gives coequal importance to the positions of FERC and the Corps on the merits of the case. More space is devoted to explaining the position of the Corps because the reader is referred to the petition for certiorari itself for a statement of FERC's position. *See* Brief of Federal Respondents at 11 n.7. It should also be noted that the Governor of West Virginia has written the Clerk of this Court to advise that the state's "policy and position" is to support the petition

less be denied because the Commission and the Corps have executed a memorandum of understanding distributing hydropower licensing authority between them in a manner they deem congenial. Fed. Br. at 9; Intervenors Br. at 7, 10.[2] Respondents also place great emphasis on their assertion that disagreements between the agencies are uncommon. Fed. Br. at 9; Intervenors Br. at 9-10.

Respondents' assertion that the memorandum of understanding resolves as between themselves the jurisdictional problem is not relevant to the issues posed in this case. The agencies' proposal that this Court allow them to substitute an improper administrative compromise for the will of Congress is strictly forbidden. *See, e.g., Board of Governors* v. *Dimension Federal Corp.*, ___ U.S. ___, 106 S.Ct. 681, 689 (1986). Nor does the memorandum prevent future agency clashes. The memorandum gives the lead environmental role to FERC. Yet the respondents, except for FERC, denigrate FERC's environmental role, maintaining that only the Corps, and not FERC, can achieve the objectives of the FWPCA. Since the memorandum preserves the Corps' veto power over FERC licensing, it must be expected that the Corps will veto FERC licensing in future cases. And the argument completely ignores EPA, which presumably has the right to veto any agreement the Corps might enter into.

Similarly, it cannot be of assistance to respondents that disagreements between the agencies over environmental matters may not occur in great numbers.[3] As the

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for certiorari and seek reversal of the court of appeals' decision. See Appendix A.

[2] As used herein the terms "Fed. Br." and "Intervenors Br." refer to the brief in opposition filed by the federal respondents and by the intervenor organizations, respectively.

[3] Petitioners agree that FERC in discharging its environmental mandate under the Federal Power Act is unlikely to disagree often with the Corps under Section 404. Under *Udall* v. *FPC*, 387 U.S. 428 (1967),

respondents acknowledge, these two agencies so far have disagreed in regard to two major energy generation projects. Until this jurisdictional dispute is resolved they may continue to do so, dealing with the same subject matter and arriving at differing conclusions after conducting entirely duplicative proceedings. It is not possible to impute to Congress a scheme that establishes such arbitrary, inconsistent decision-making.

Respondents attempt to belittle the need for certiorari by contending that this case is of little practical moment. The petitioners see much practical moment to a situation where the Corps vetoes a license issued by FERC.[4] The question whether the Federal Power Act confers upon FERC exclusive jurisdiction over hydropower licensing goes directly to the fundamental issues of coordination, consistency, and reliability that passage of the Act was intended to settle. Resolution of the question will determine whether FERC will be entitled to exercise its express authority under Section 10(a) of the Federal Power Act to decide whether a project is, "in the judgment of the Commission," "best adapted" to the public interest.[5]

FERC is required to incorporate the national policies of the FWPCA into its determination of the "public interest." *See* Petition at 22-24.

[4] The subject of this litigation, the Davis Pumped Storage Hydroelectric Project, illustrates the need for clarification of the FERC exclusive licensing jurisdiction. The administrative law judge in the FERC proceeding, the Corps of Engineers in its separate duplicative proceeding, and FERC itself all supported a project in the Canaan Valley. J.A. 156-231, 232-284, 684-695. Both the administrative law judge and FERC noted the threat of uncontrolled development to the Canaan Valley environment and the fact that a project in the Valley could serve to achieve environmental protection. *See* J.A. at 216-17, 259. The Intervenor organizations also note (at 4) that the Canaan Valley was designated a natural landmark. The Canaan Valley would continue to qualify for such a designation if the Davis Project were to be built and, as recommended, proper land use controls were implemented. (Project No. 2709, FPC Transcript, Vol. 27, pp. 3816-25, 3834, 3858.)

[5] Whether FERC appropriately balanced the various elements is the

II. RESPONDENTS' JURISDICTIONAL ARGUMENTS CONFLICT WITH CLEAR EXPRESSIONS OF LEGISLATIVE INTENT AND THIS COURT'S CANONS OF STATUTORY INTERPRETATION

A. The Legislative History of the FWPCA Supports Exclusive FERC Hydropower Licensing Authority

Respondents' search of the legislative history of the FWPCA has yielded no evidence whatsoever that Congress intended Section 404 to apply to hydropower projects within the Commission's exclusive jurisdiction. The 1972 act deals importantly with public and private actions affecting the environment. But so does the requirement under the Federal Power Act for the painstaking environmental review under Section 10(a) that the Commission performed in its seven-year consideration of the Davis Project. *See* Petition at 5-6, 23-24. The question is not whether the FWPCA introduced a new era of environmental sensitivity, but whether in circumstances where FERC has environmental jurisdiction Congress intended to repeal such jurisdiction and give the Corps veto power over the licensing function that had been exercised exclusively by FERC for more than fifty years. There is no indication that Congress intended to establish a dual, overlapping licensing system in which the two agencies would conduct simultaneous, duplicative and potentially conflicting "public interest" reviews of the same project. Where Congress could establish or reemphasize any environmental standards for hydropower projects simply by amending the Federal Power Act—as it did, for example, in the Electric Consumers Protection Act of 1986 ("ECPA"), Pub. L. No. 99-495, 100 Stat. 1243 (1986)—the FWPCA cannot be interpreted to require duplicative administrative proceed-

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subject of a separate appeal resolution of which has been stayed pending the completion of these proceedings.

ings.[6] The requirement in Section 4(e) of the Federal Power Act of Corps of Engineers approval of the design of a dam or other structure part of a FERC-licensed project in navigable waters shows that Congress was clear in including the Corps in FERC licensing when it so chose.

B. Subsequent Congressional Actions Confirm That Congress Never Intended Section 404 to Apply to Hydropower Projects Subject to FERC Jurisdiction

Respondents' attempts to discredit Congress' reaffirmations that FERC's hydropower jurisdiction remained exclusive following passage of the FWPCA are simply not in accord with the facts. The plain language of the Conference Report which led to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977), declaring that FERC's "exclusive jurisdiction" over hydropower licensing excludes further review "by the Secretary of Energy *or any other executive branch official*," is obviously a perfectly clear reference extending beyond the Secretary of Energy. H.R. Conf. Rep. No. 539, 95th Cong., 1st Sess. 55, 75, *reprinted in* 1977 U.S. Code Cong.

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[6] The intervenor organizations' suggestions to the contrary are inaccurate. These respondents assert (Br. 13) that authority over discharge of "fill" material was given to the Corps in Section 404, showing an intention to include hydroelectric projects. The Corps has, however, historically possessed jurisdiction over "fill" materials. *See* Rivers and Harbors Act of 1899, Act of March 3, 1899, § 10, 30 Stat. 1121, 1151. Respondents also assert (Br. 13) that petitioners' description of Section 404 as preserving the Corps' former jurisdiction is inaccurate. It is not. Section 404 indeed derived from the "very simple amendment" added by Senator Ellender to preserve existing Corps authority—authority that did not then extend to Commission-licensed projects. *See* Petition at 15-16. The Ellender amendment was in turn modified by an alternative proposed by Senator Muskie (and accepted by Senator Ellender) which just gave EPA veto power over Corps determinations. 117 Cong. Rec. S38854-57 (1971). After the passage of Section 404 in 1972 the Corps interpreted Section 404 as not applying to Commission-licensed projects, *see* Petition at 16, and FERC, through interpretation of its own organic statute, continues to hold that view.

& Admin. News 925, 946 (emphasis added.) The Corps' bald assertion to the contrary is simply inconsistent with this plan meaning. *See* Fed. Br. at 16 n.12, *see also* Intervenors Br. at 17-18.

Respondents similarly fail to discredit ECPA, *supra*, in which Congress amended the Federal Power Act, not Section 404, to reemphasize the environmental considerations that must be addressed by FERC in a hydropower licensing. If Congress indeed shared respondents' view that such environmental protection was entrusted to the Corps, then Congress would have expressed its intentions through an amendment to the FWPCA. It is settled that such views of later Congresses about prior legislation "have persuasive value." *Bell* v. *New Jersey*, 461 U.S. 773, 784 (1983). *Cf. St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 786 (1981) (later congressional indication "too general and too ambiguous" to alter meaning of prior legislation).

C. Respondents' "Reconciliation" of the FWPCA and the Federal Power Act Violates this Court's Fundamental Tenets of Statutory Construction

Respondents' jurisdictional argument is based upon the undisputed truism that the 1920 Federal Power Act did not prospectively preempt all subsequent legislation. *See* Fed. Br. at 15; Intervenors' Br. at 15-16. That is not the issue. Rather, the significant question to be answered (and which can only be answered definitively by this Court) is whether comprehensive legislative enactments like the Federal Power Act are to be accorded proper deference and protection, or can be amended and even repealed by court interpretation of vague and imprecise language in later statutes. As this Court stated in *Train* v. *Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 24 (1976), comprehensive statutory schemes may only be disturbed by subsequent legislation if there is a "clear indication of

legislative intent" to do so.[7] Respondents would ignore this stricture, finding an implied modification of an existing statutory structure even where there is no such "clear indication."[8]

Respondents (except for FERC) repeat the error of the court of appeals by construing the statutory schemes in a manner that impermissibly, and needlessly, trespasses on the Federal Power Act. Under Section 10(a) of the Act a license issues if "in the judgment of the Commission" the project is "best adapted" to the public interest. *See Udall* v. *Federal Power Commission*, 387 U.S. 428, 450 (1967). Insertion of the Corps' veto power into the licensing process reads out of Section 10(a) the judgment of the Commission and frustrates the critical purpose of the Federal

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[7] Such is the case with the statute construed in *Appalachian Power Co.* v. *United States*, 607 F.2d 935 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935 (1980), which by its own terms is specifically applicable to hydropower projects. *Id.* at 941.

[8] The Corps of Engineers suggests that *Train* is merely a vehicle for giving effect to an agency's interpretation of a statute it administers. Fed. Br. at 14-15 n.11. This tortured construction is wholly at odds with the Court's opinion, which expressly states that EPA's interpretation of the statute was *not* relied upon. 426 U.S. at 8 n.8. Moreover, it rather pointedly ignores FERC's interpretation of its own organic statute.

Indeed, the Corps' interpretation of its obligations has been far from consistent. As stated in the petition, the Corps' regulations did not apply to the Davis Project until 1977. *See* Petition at 7. Respondents' assertion that petitioners are in error stems from their misreading of the petition to refer to Corps jurisdiction over hydroelectric projects generally. *See* Fed. Br. at 9; Intervenors Br. at 9. Although that general action was taken in regulations that became final in 1975, it was not until July 1, 1977 that the Corps, under court order in *NRDC* v. *Callaway*, 392 F.Supp. 685 (D.D.C. 1975), implemented an expanded definition of "navigable waters" that for the first time embraced the site of the Davis Project. *See* 40 Fed. Reg. 31326 (1975). The Corps of Engineers decision in this case itself so states: "[U]nder the three-phased implementation of Corps regulatory jurisdiction, regulation of the Blackwater River became effective 1 July 1977." J.A. 685.

Power Act to centralize hydropower licensing in one agency so that a coherent vision of the public interest can be implemented. *See* Petition at 12, A-8; Intervenors Br. at 16. While "other federal environmental, health, safety, or welfare statutory requirements" may happily coexist with the Commission's broad responsibilities, Fed. Br. at 16, this one clearly can not.

III. RESPONDENTS MISCONSTRUE THE ENVIRONMENTAL OBLIGATIONS OF BOTH FERC AND THE CORPS

Respondents and the court of appeals erroneously portray the FERC and Corps' environmental responsibilities as markedly different—FERC to do a balancing of interests and the Corps to effect sharply defined criteria—giving the mistaken impression that the Corps' participation in hydropower licensing decisions is necessary to protect the public interest. *See* Fed. Br. at 17-19; Intervenors Br. at 22. That is not so, and is not consistent with the Corps' own description of its responsibility in this very case.[9] Both agencies must examine all factors, environmental and otherwise. FERC has an obligation to implement environmental values, Petition at 22-25, just as the Corps has an obligation in Section 404 proceedings to "give great weight to energy needs as a factor in the public interest review and . . . give high priority to permit actions involving energy projects." 33 C.F.R. § 320.4(n).

Respondents also attempt to avoid the court of appeals'

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[9] The Corps stated that in arriving at its conclusion on the Davis Project "a careful balance must be reached between the ever increasing demands for additional power, the lifeblood of economic health, and the progress necessary to encourage a growing population, on one hand, and on the other, the preservation, conservation and protection of ecological and other resources having significant human value. All are essential." J.A. 694.

virtual dismissal of FERC's environmental obligations. Fed. Br. at 8-9; Intervenors Br. at 21. But the court of appeals' own language, addressed by neither brief in opposition, asserts clearly that neither FERC's statutory nor regulatory obligations impose any real substantive environmental responsibilities upon the agency.[10] This is a stunning departure from settled law. Given the national priority on the environment, FERC's environmental obligation is an important continuing question needing resolution by this Court.

IV. CONCLUSION

The petition for certiorari should be granted.

July 29, 1987 Respectfully submitted,

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[10] The court of appeals grudgingly acknowledges "the mere existence of an implied general obligation on FERC's part to consider conservation factors," Petition at A-24, but states that this statutory obligation does not "create[] a format for decision-making, the absence of which is the crux of the present problem." *Id.* Similarly, the court of appeals dismisses FERC's environmental regulations as "unchanneled, precatory invitations for information" that are specifically distinguished from the "rigorous study demanded of the Corps." *Id.* The "critical difference" between the environmental review performed by the Commission and the Corps, according to the court of appeals, is that the Commission's regulations do not establish "standards governing decisions," "impose[] no direct restraints on FPC's deliberations or determinations," provide inadequate "assistance in its [environmental] review," and do not set forth goals "in any wise analogous" to those of the Corps. *Id.* at A-23

APPENDIX

APPENDIX A

STATE OF WEST VIRGINIA
OFFICE OF THE GOVERNOR
CHARLESTON 25305

[SEAL]

Arch A. Moore, Jr.
Governor

June 12, 1987

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Monongahela Power Company, et al. v. Marsh, et al., No. 86-1642

Dear Mr. Spaniol:

Please inform the Court that the State of West Virginia will not file a brief in opposition to the pending petition for certiorari in the above-referenced case. It is the policy and position of the State of West Virginia that the petition for certiorari should be granted.

Previous appearances in this case by the Attorney General of West Virginia, an elective office created by the Constitution of West Virginia, have reflected the views of the Attorneys General, and do not represent the position of the State of West Virginia. If your dockets and court records indicate that the State of West Virginia is a party to this action, they are inaccurate, and should be corrected to refer to the Attorney General as the party litigant.

Sincerely,

/s/

Arch A. Moore, Jr.
Governor

AAMJr:je